90-6 89

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

No. -

JOSEPH A. KRAUS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DENNIS E. ZAHN
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Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the 5th Amendment to the United States Constitution, in light of the decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In Re: Winship*, 397 U.S. 358 (1970) require that specific fact determinations made pursuant to sentencing under the federal sentencing guidelines be made by a standard of proof beyond a reasonable doubt.

LIST OF PARTIES

All parties appear in the caption of this case in this Court.

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OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated August 1, 1990, unpublished, appears in the Appendix hereto (Appendix A).

JURISDICTION

The decision of the United States Court of Appeals was entered on August 1, 1990. This Petition was filed within ninety (90) days of that date as required by Supreme Court

Rule Number Thirteen (13). Jurisdiction is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution of the United States of America which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arrising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 18, 1988, Joseph A. Kraus was charged with various violations of Title 21, United States Code Sections 841(a)(1), 845(a) and 846, that is, knowingly distributing and conspiring to possess with the intent to distribute and to distribute cocaine, a Schedule II Narcotic Controlled Substance.

Kraus pleaded guilty on January 6, 1989, as charged in Counts 1, 11, 16, 21, 44, 48, 55 and 56. On March 20, 1989 the Court held a sentencing hearing and the Court sentenced the Defendant, Joseph A. Kraus, to one hundred eighty (180) months on each count to be served concurrently.

The Presentence Investigation Report prepared by the United States Probation Office, calculated that the defendant Kraus should have four levels added to his offense level because he was an organizer or leader of the criminal activity. Kraus submitted to the Court his position summary

contesting the conclusions reached in the Presentence Investigation Report concerning the offense level score.

At the sentencing hearing, the Government presented testimony of the F.B.I. case agent who testified that the investigation revealed Kraus had made several trips to Florida where he made contacts in an effort to obtain a source of cocaine and he did ultimately obtain a source of supply. Additionally, the investigation revealed that Kraus handled negotiations and that he made arrangements for someone else to transport the cocaine from Florida to Indianapolis. The F.B.I. agent also testified that through his investigation he learned Kraus directed the sale of cocaine through at least one other individual.

At the sentencing hearing Defendant Kraus took the position that the testimony of the F.B.I. agent was conclusory in nature and lacked specifics necessary to judge its reliability. The District Court found that Kraus was an organizer of the cocaine activity. Kraus appealed the decision of the District Court to the United States Court of Appeals for the Seventh Circuit, where he again argued that the Court erred in determining that Kraus was an organizer or leader of the criminal activity. Thereafter on August 1, 1990 the Court of Appeals affirmed the decision of the District Court.

REASONS THE WRIT SHOULD BE GRANTED

THE DUE PROCESS CLAUSE OF THE 5th AMENDMENT AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and IN RE: *Winship*, 397 U.S. 358, 90 S.Ct. 1068 25 L.Ed.2d 368 (1970), PROHIBITS THE INCARCERATION OF ANY PERSON BASED UPON SPECIFIC FACT DETERMINATIONS WHICH ARE NOT PROVEN BEYOND A REASONABLE DOUBT.

Prior to the promulgation of the Sentencing Guidelines it was not necessary to prescribe a burden of proof for the de-

termination of facts relied upon in sentencing. Judges had great discretionary authority and generally no one fact determination had any significant impact on a sentence sufficient to be challenged upon appeal. This is no longer the case. Now under the Sentencing Guidelines the Court is required to make specific fact determinations that directly impact the exact amount of time a person will have to serve in prison.

Every Court of Appeals decision to date regarding the standard of proof required to establish a fact determination under the Guidelines, has held that the fact need only be established by a preponderance of evidence standard. See *U.S. v. Frederick*, 897 F.2d 490 (10th Cir. 1990).

The reasons relied upon by the Court of Appeals in establishing the preponderance of evidence standard are: the decisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence: determining that information is not materially false does not require any type of heightened scrutiny: strong policy reason of promoting judicial economy. *U.S. v. McDowell*, 888 F.2d 285 (3rd Cir. 1989).

In support of their reasoning the various Circuit Courts of Appeals rely in significant part on the decision rendered by the United States Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411 (1986). See *U.S. v. McDowell*, 888 F.2d 285 (3rd Cir. 1989); *U.S. v. Frederick*, 897 F.2d 490 (10th Cir. 1990); *U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990); *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989). However, it appears to this petitioner that this reasoning cannot stand when held up to the teachings of this Court in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1887 (1975).

In *Mullaney, Supra*, this Court was confronted with a felonious homicide statute of the State of Maine. The Maine Supreme Judicial Court has interpreted its felonious homi-

cide law such that murder and manslaughter are punishment categories of felonious homicide.

The arguments of the State in *Mullaney, Supra*, were that the proof of "heat of passion" does not come into play until the jury already has determined that the defendant is guilty. "In this situation Petitioners maintain, the defendants critical interests in liberty and reputation are no longer of paramount concern since irrespective of the presence or absence of the heat of passion on sudden provocation, he is likely to lose his liberty and certain to be stigmatized". (*Mullaney v. Wilbur*, 421 U.S. at 697).

In dealing with this argument this Court in *Mullaney, Supra*, said at 421 U.S. 697 and 698:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes. To those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Defendant Kraus had his punishment significantly increased because of the conclusory and unsubstantiated testimony of the F.B.I. agent, that his investigation revealed that Kraus was a leader or organizer of the criminal activity. Such increases in punishment on fact sensitive issues

must be supported by proof of the fact beyond a reasonable doubt, and to do less constitutes a denial of Due Process as guaranteed by the 5th Amendment to the Constitution.

CONCLUSION

For all the foregoing reasons, Petitioner requests that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted July 20, 1990*
August 1, 1990

Before
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the United) States District Court for) the Southern District of In-) diana, Indianapolis Division.
No. 89-1710 v.	) No. 88 CR 85)
WILLIAM C. LEMONS, *Defendant-Appellant.*	) Sarah Evans Barker,) *Judge.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 89-1693 v.	No. 88 CR 85
JOSEPH A. KRAUS, *Defendant-Appellant.*	Sarah Evans Barker, *Judge.*

*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal is submitted on the briefs and record.

ORDER

Defendants William C. Lemons and Joseph A. Kraus appeal from their sentences imposed pursuant to a plea agreement under Fed. R. Crim. P. 11(e)(1)(C). We consolidated their appeals, and for the reasons set forth below, we affirm both sentences.

I.

Lemons pled guilty to ten counts of various cocaine distribution charges, with an agreed upon sentence of 15 years (180 months). Lemons' Presentence Investigation Report calculated his Criminal History Category as Level I, his offense level as 34, and his guidelines range as 151 to 188 months. The district court sentenced him to 180 months on each count, to be served concurrently. On appeal, he argues that he should not have been sentenced under the Sentencing Reform Act because his offenses occurred prior to November 1, 1987, that the district court should have required proof beyond a reasonable doubt of the amount of drugs involved in his offense and his status as an organizer, and that the Narcotic Penalties and Enforcement Act is unconstitutional.

Kraus pled guilty to eight counts of various cocaine distribution charges, with an agreed upon sentence of 15 years (180 months). Kraus' Presentence Investigation Report calculated his Criminal History Category as III and his offense level as 34,[1] with a resulting sentencing range of 188 to 235 months. The district court sentenced him to 180 months on each count, to be served concurrently. On appeal, he argues that his Criminal History Category was improperly based on unconstitutional convictions, and that he was improperly categorized as an organizer of the drug activity.

---

[1]Kraus' base offense level was 32, which was reduced by two levels for acceptance of responsibility, §3E1.1, and increased by four levels for being an organizer of the cocaine activity. §3B1.1.

II.
A.

In both appeals, the government first argues that we should not even reach the merits of defendants' claims because we have no jurisdiction over these appeals. It argues that 18 U.S.C. §3742 does not allow for the filing of a notice of appeal in this case. We disagree. While §3742(c)(1) provides that a defendant who has entered a plea under Rule 11(e)(1)(C) may not appeal under §3742(a)(3) or §3742(a)(4) if he has not received a sentence greater than that in the plea agreement, there is no such prohibition against bringing an appeal under §3742(a)(1) or §3742(a)(2). Here, Lemons' claims all fall under §3742(a)(1) as claims that his sentence was imposed in violation of the law, and Kraus' claims both fall under §3742(a)(2) as claims that the guidelines were incorrectly applied in his case to establish his guidelines range. Although both defendants signed plea agreements setting forth a sentence of 180 months, that does not prevent them from challenging the legality of the sentence that was imposed or the accuracy of the guidelines range determination. First, an illegal sentence cannot be enforced regardless of the plea agreement. Second, defendant Kraus' challenge regarding the application of the guidelines, if correct, would reduce the upper end of his guideline range to under 180 months, and thus have provided a different scenario for the district court judge, who, prior to accepting a plea, must specifically find justifiable reasons for any departure from the guidelines in a plea agreement's stipulated sentence. §6B1.2. In *U.S. v. Tholl*, 895 F.2d 1178, 1180 n.2 (7th Cir. 1990), we held that we had jurisdiction over the appeal of a defendant who was sentenced pursuant to a plea agreement since he raised challenges under §3742(a)(1) and §3742(a)(2). Defendants thus are not and should not be prevented from appealing their sentences here.

B.

Lemons makes three arguments on appeal. First, he argues that the Sentencing Reform Act was inapplicable to Count I of his sentence, since it is only applicable to crimes committed after November 1, 1987, and that the conspiracy alleged in Count I occurred in the Spring of 1986. He claims that application of the Act to him violated the *ex post facto* clause of the Constitution. Lemons argues that the conspiracy began before November 1, 1987, and the overt acts were committed at this time, and that the fact that his involvement in the conspiracy continued after that date is irrelevant because the Act is inapplicable to offenses begun before November 1, 1987 but completed after that date. We disagree. "A statute increasing the penalty for conspiracy does not violate the *ex post facto* clause when applied to a conspiracy begun before the increase that continued on after the increase." *U.S. v. Pace*, 898 F.2d 1218, 1238 (7th Cir.), *cert. denied*, 58 U.S.L.W. 3835 (1990). In *U.S. v. Paiz*, No. 89-1264, slip op. at 32 (7th Cir. June 6, 1990), we held that the Controlled Substances Penalties Amendments Act of 1984 could be applied to a conspiracy which ran from 1983 to April or May of 1987, since the offense "ran after" the October 27, 1986 effective date of the Amendment. In *Paiz*, we cited with approval two cases from other circuits which applied this reasoning to the 1987 Amendment to the Sentencing Reform Act. *Paiz*, slip op. at 32 (citing *U.S. v. Story*, 891 F.2d 988 (2d Cir. 1989) and *U.S. v. Lee*, 886 F.2d 998 (8th Cir. 1989). We now join the seven circuits that have addressed this issue in specifically holding that a defendant in a conspiracy which begins before and ends after November 1, 1987 is properly sentenced under the Sentencing Reform Act and Sentencing Guidelines. *See U.S. v. Meitinger*, 901 F.2d 27 (4th Cir. 1990); *U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990); *U.S. v. Thomas*, 895 F.2d 51 (1st Cir. 1990); *U.S. v. Rosa*, 891 F.2d 1063 (3d Cir. 1989); *U.S. v. Story*, 891 F.2d 988 (2d Cir. 1989); *U.S. v. Lee*, 886 F.2d 998 (8th Cir.), *cert. denied*, 110 S. Ct. 748 (1990); *U.S. v.*

White, 869 F.2d 822 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989). The conspiracy with which Lemons was charged began in 1986 but continued until July 25, 1988; he therefore was properly sentenced under the Sentencing Reform Act.

Second, Lemons claims that the district court was required to find that the amount of the drugs involved in his transaction and his status as an organizer of the criminal activity were proven beyond a reasonable doubt, and that the failure to use the reasonable doubt standard violates due process. We have held that the "Guidelines' standard for resolving disputes is a preponderance of the evidence, not reasonable doubt." *U.S. v. White*, 888 F.2d 490, 499 (7th Cir. 1989). Use at sentencing of a standard less than "beyond a reasonable doubt" does not violate due process. *Jones v. Thieret*, 846 F.2d 457, 461-62 (7th Cir. 1988).

Finally, Lemons challenges the constitutionality of the Narcotics Penalties and Enforcement Act as creating two inconsistent penalty schemes in violation of due process. The mandatory minimum sentencing provisions under which Lemons was sentenced read:

> such person shall be subject to a term of imprisonment which may not be less than [stated years], and not more than [stated years], a fine . . ., or both.

21 U.S.C. §841(b)(1). Lemons claims this allows for the imposition of a fine in lieu of a prison term, but that that is inconsistent with a sentence in each subparagraph which states that "the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph", which suggests that a prison term is required in every instance. He argues that such ambiguity in the statute violates due process, as it is unclear whether there is or is not a mandatory minimum term of imprisonment required under the statute.

We agree with Lemons that the language of that isolated provision suggests that a fine could be imposed in lieu of imprisonment. However, when the language of §841(b) is

viewed as a whole, as it must be, *U.S. v. Franz*, 886 F.2d 973, 977-78 (7th Cir. 1989); *U.S. v. Sager*, 881 F.2d 364, 366 (7th Cir. 1989), we think it clear that a term of imprisonment is required in all instances where the language begins "such person shall be sentenced to a term of imprisonment which may not be less than. . . ." First, every provision that contains this language ends with the following language:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed herein.

Lemons himself states that this language implies that a term of imprisonment be imposed for every offense committed which is sentenced under these subparagraphs. Second, the fact that the provisions set *minimum* prison terms for each category of offense would make it unreasonable to read those provisions as optional or alternative to the provisions allowing for fines (which in contrast set maximum limits). Finally, the language of the subparagraphs in §841(b) contrasts with that found in §841(d), which states that persons possessing certain chemicals "shall be fined in accordance with Title 18, *or* imprisoned not more than ten years, or both." (emphasis added). The language of §841(d) is clearly in the alternative and a fine under this section may be imposed in lieu of the prison term. It is significant that the language in §841(d) was added in 1988; the prior language had the same format as that still found in §841(b), stating that the convicted person

> shall be sentenced to a term of imprisonment not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, . . ., or both.

Pub. L. 100-690, §6055. Viewing the statute as a whole, we find the provisions of §841(b) at issue here to be mandatory minimum imprisonment sentences. The language which

Lemons challenges thus means that the judge can sentence a defendant to either just the imprisonment term, or the imprisonment term in combination with the designated fine.

Furthermore, the history of the revisions to §841(b) make it absolutely certain that Congress intended that these statutory provisions serve as mandatory minimum sentences. The purpose of the amendments was to strengthen the penalties for drug and narcotic offenses as part of the larger scheme of the Anti-Drug Abuse Act. "Courts should not interpret statutes in a manner inconsistent with the overall statutory scheme." *Norwood v. Brennan*, 891 F.2d 179, 182 (7th Cir. 1989). Lemons does not claim that the Congressional purpose was otherwise, but rather argues that Congressional intent cannot save the statute here because by its terms it violates due process, and the rule of lenity used in criminal cases must be applied. We find the rule of lenity inapplicable here, since that rule acts as a tie-breaker only "when there is an otherwise-unresolved ambiguity." *White*, 888 F.2d at 497. As stated above, any ambiguity has been resolved here.

Finally, we observe that the two other circuits to address this issue have reached the same conclusion we reach today. *See U.S. v. Hoyt*, 879 F.2d 505, 511-12 (9th Cir. 1989); *U.S. v. Musser*, 856 F.2d 1484, 1486 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1145 (1989).[2]

C.

The first argument we address in defendant Kraus' appeal is his claim that the district court improperly found that he was an organizer of the cocaine activity, and thus should not have increased his offense level by four on that basis under §3B1.1(a). Kraus argues that the government had to prove his organizational role either by clear and convincing evidence or beyond a reasonable doubt. As stated above, we

[2]The government's brief refers to the Eleventh Circuit case as if it were controlling precedent, and offers no independent analysis of this issue. We note our disapproval of this practice.

have held that the standard for resolving disputes under the Guidelines is by a preponderance of the evidence. *White*, 888 F.2d at 499. Our standard of review over this factual determination is for clear error by the district court. *U.S. v. Brown*, 900 F.2d 1098, 1101 (7th Cir. 1990). Given the testimony at sentencing of Special Agent Waggoner regarding Kraus' fronting of money for cocaine purchases, his trips to Florida to negotiate for the purchase of cocaine, his purchase of cocaine when others involved in the activity were unable to do so, and his arranging for the transportation of the cocaine from Florida to Indiana, we cannot say that the district court's finding that Kraus played an organizational role in the cocaine transaction was clearly erroneous.

Kraus' second argument on appeal is that the district court should not have used his two 1977 Kentucky convictions to support a Criminal History Category III because those convictions were constitutionally invalid. It is true that a defendant may attempt to prove that prior convictions were invalid and therefore should not be included in the Criminal History Category calculation. §4A1.2, Application Note 6. However, we decline to address this issue here because even were we to agree with Kraus' argument there would be no need for a remand for resentencing. We will not resolve disputes over Criminal History Categories where the same sentence could have been imposed under either of the argued applicable categories, and it is reasonable to conclude that the same sentence would have been imposed under either category. *U.S. v. Dillion*, No. 88-3505, slip op. at 5-6 (7th Cir. June 20, 1990); *see also U.S. v. Tetzlaff*, 896 F.2d 1071, 1073 (7th Cir. 1990). Here, Kraus' claim, if accepted, would move him down to a Criminal History Category I. However, the range for that category with an offense at level 34 (which is the appropriate offense level given our rejection of Kraus' challenge to his four point increase as an organizer of the cocaine activity) is 151-188 months. Kraus' 180 month sentence is within that range. It is reasonable to conclude that Judge Barker would have im-

posed that same term even had she viewed the range as between 151-188 months rather than the 188-235 month range upon which she relied, because she was accepting the sentence stipulated to in the plea agreement rather than relying solely upon the guidelines range. Under the Guidelines the judge was required to determine the appropriate range and make sure the stipulated sentence was within that range or that any departure was justified. Here the judge found that departing downward eight months was justified because of Kraus' remorse and expression of intent to rehabilitate himself, and because she felt it important to impose the sentence which the defendant had agreed to and participated in. It is therefore reasonable to assume Judge Barker would not have further departed downward had she been viewing the correct guideline range as 151-188 months, and would still have imposed the 180 month sentence.

The fifteen year sentences of Lemons and Kraus are AFFIRMED.

APPENDIX B

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA V. JOSEPH A. KRAUS	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT Case Number IP 88-85-CR-02
(Name of Defendant)	Dennis E. Zahn and James H. Voyles Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 11, 16, 21, 44, 48, 55 and 56

☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC 841(a)(1)	Conspiracy to possess with intent to distribute cocaine	1
21 USC 841(a)(1)	Possession with intent to dist. cocaine	11, 16, 21 & 56
21 USC 841(a)(1) & 845(a)	Distribution of cocaine within 1000 feet of school or college	44 & 47
21 USC 841(a)(1) and 18 USC 2	Attempt to distribute cocaine	55

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found guilt on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine

☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 400.00 which shall be due immediately.

It is further ordered that the defndant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
406-64-3364

March 20, 1989
Date of imposition of Sentence

Defendant's mailing address:
c/o Marion County Jail
220 East Maryland Street
Indianapolis, IN 46204
Defendant's residence address:
3745 E. South County Line Road
Indianapolis, IN 46227

_____
Signature of Judicial Officer

Sarah Evans Barker, Judge
Name & Title of Judicial Officer

March 21, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred and eighty (180) months, consisting of 180

months each on Counts 1, 11, 16, 21, 44, 48, 55 and 56, to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
that the defendant be incarcerated at a facility in to southeast region or the United States.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshall for this district,

☐ at _____ a.m. p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant deliveredy on _____ to _____ at _____,
with a certified copy of this Judgment.

_____
United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of six (6) years on each Count, to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.